

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

76-

To be argued by
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
SYNTAX TIME SHARING, LTD., and ABLERT :
BARKSDALE, JR. individually and as :
agent of SYNTAX TIME SHARING, LTD., :

Plaintiffs-Appellants, :

-against- :

MAX SIRKUS, as CALENDER CLERK OF THE :
SUPREME COURT, NEW YORK COUNTY, CHASE :
MANHATTAN BANK, N.A. WILLARD COHEN, :
and ROBERT BREAKSTONE, individually :
and as agents of CHASE MANHATTAN BANK, :
N.A., :

Defendants-Appellees. :
-----X

BRIEF FOR APPELLEE MAX
SIRKUS, AS CALENDAR CLERK,
SUPREME COURT NEW YORK
COUNTY

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee
Max Sirkus
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3394

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

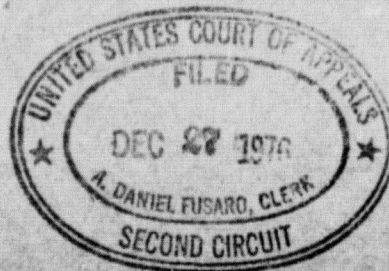


TABLE OF CONTENTS

	<u>PAGE</u>
Question Presented.....	1
Statement of the Case.....	2
ARGUMENT - NO FEDERAL QUESTION IS STATED BY THE COMPLAINT.....	3
Conclusion.....	5

TABLE OF CASES

<u>Fine v. City of New York,</u> 529 F. 2d 70, 73 (2d Cir. 1975).....	4
<u>Olesen v. Trust Company of Chicago,</u> 245 F. 2d 522 (7th Cir.) cert. den. 355 U.S. 896 (1957).....	4
<u>Powell v. Workmen's Comp. Board,</u> 327 F. 2d 131, 137 (2d Cir. 1964).....	4
<u>Ross v. Bernhard,</u> 396 U.S. 531 (1970).....	4
<u>Wartman v. Branch 7, Civil Division,</u> County Court, etc., 510 F. 2d 130, 134 (7th Cir. 1975).....	4

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
SYNTAX TIME SHARING, LTD., and ABLERT :
BARKSDALE, JR. individually and as :
agent of SYNTAX TIME SHARING, LTD., :

Plaintiffs-Appellants, :

-against- :

MAX SIRKUS, as CALENDER CLERK OF THE :
SUPREME COURT, NEW YORK COUNTY, CHASE :
MANHATTAN BANK, N.A. WILLARD COHEN, :
and ROBERT BREAKSTONE, individually :
and as agents of CHASE MANHATTAN BANK, :
N.A., :

Defendants-Appellees. :
-----X

~~76-7455~~
76-7455

BRIEF FOR APPELLEE MAX
SIRKUS, AS CALENDAR CLERK,
SUPREME COURT NEW YORK
COUNTY

Question Presented

Did the complaint state a claim within the
jurisdiction of the U.S. District Court?

Statement of the Case

This is an appeal from a judgment of the District Court for the Southern District of New York (Wyatt, J.) entered August 20, 1976 dismissing the complaint for lack of jurisdiction.

This case arises out of a civil action between appellants and appellees Chase Manhattan Bank, Cohen and Breakstone in Supreme Court, New York County (#19807/73).

The gravamen of appellants' complaint is that appellee Sirkus, in alleged violation of appellants' rights under federal and state law, wrongfully refused to file a note of issue calling for a trial by jury (cplt. ¶ "13", "14", "24" and "25").

For this they seek declaratory and injunctive relief as well as money damages.

Appellees Chase Manhattan Bank, et al., moved to dismiss the complaint for lack of jurisdiction. On August 6, 1976, the court not only granted their motion but

dismissed the entire action for lack of jurisdiction. In its memorandum of August 9 the court summarized the case as follows:

"The claims in this action rest on a refusal by a calendar clerk in the New York Supreme Court to accept a note of issue with a jury demand by plaintiffs in an action by plaintiffs which is pending in the State Court.

It is perfectly clear, however, that no federal question is involved in this action. The guaranty of a jury trial in civil actions, found in the Seventh Amendment, applies only to trials in federal courts. In civil actions, the state may modify trial by jury or abolish it altogether, Olesen v. Trust Company of Chicago, 245 F. 2d 522 (7th Cir.), cert. den. 355 U.S. 896 (1957)".

ARGUMENT

NO FEDERAL QUESTION IS STATED BY THE COMPLAINT

Appellants concede, br. p. 4 that there is no federal right to a jury trial in state civil actions, as noted in the District Court's decision which cited

Olesen v. Trust Company of Chicago, 245 F. 2d 522 (7th Cir.) cert. den. 355 U.S. 896 (1957). See also Wartman v. Branch 7, Civil Division, County Court, etc., 510 F. 2d 130, 134 (7th Cir. 1975). Nowhere in the Supreme Court's discussion of the right to a jury trial in Ross v. Bernhard, 396 U.S. 531 (1970) is there any suggestion that the Seventh Amendment applies in the state courts.

However, appellants seek to avoid this jurisdictional infirmity by their vague, conclusory allegations that appellee Sirkus' conduct was in violation of appellants other constitutional rights, appt's br. pp. 4-5. Such a claim is still insufficient to invoke the jurisdiction of the federal courts. Powell v. Workmen's Comp. Board, 327 F. 2d 131, 137 (2d Cir. 1964). Fine v. City of New York, 529 F. 2d 70, 73 (2d Cir. 1975).

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD
BE AFFIRMED

Dated: New York, New York
December 27, 1976

Respectfully submitted,

Louis J. Lefkowitz

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee
Max Sirkus

ROBERT S. HAMMER
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

MARY KO , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellee Max Sirkus
herein. On the 27th day of December , 1976 , she
served the annexed upon the following named person :

JOSEPH WARDE, ESQ.
Attorney for Appellants
505 Park Avenue
New York, New York 10022

MILBANK, TWEED, HADLEY & McCLOY, ESQS.
Attorneys for Chase Manhattan Bank,
N.A. & Cohen
One Chase Manhattan Plaza
New York, New York 10005

Attorneys in the within entitled appeal by depositing
3 copies
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorneys at the
address eswithin the State designated by them for that purpose.

Mary Ko

Sworn to before me this
27th day of December , 1976

[Signature]
Assistant Attorney General
of the State of New York